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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1096

MRS. MATTIE L. SMITH,

Appellant,

vs.

JEFFERSON COUNTY, GEORGIA, ETC., ET AL.,

Appellees

PETITION ON REHEARING FOR ALLOWANCE OF WRIT OF CERTIORARI TO REVIEW FINAL JUDGMENT OF THE SUPREME COURT OF GEORGIA AND BRIEF IN SUPPORT OF PETITION.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1096

MRS. MATTIE L. SMITH,

Appellant,

vs.

JEFFERSON COUNTY, GEORGIA, BY AND THROUGH ITS BOARD OF COMMISSIONERS OF ROADS AND REVENUES, J. E. BARROW, CLARENCE HENDERSON, AND SCHOOL DISTRICT NO. 2 OF JEFFERSON COUNTY, GEORGIA, BY AND THROUGH ITS BOARD OF TRUSTEES, F. T. McELREATH, W. D. EVANS, S. W. OVERSTREET AND J. W. FUTRAL, AND T. H. RIVERS AS TAX COLLECTOR OF JEFFERSON COUNTY, GEORGIA, AND JAMES HUBBARD AS SHERIFF OF JEFFERSON COUNTY, GEORGIA,

Appellees

PETITION ON REHEARING FOR ALLOWANCE OF WRIT OF CERTIORARI TO REVIEW FINAL JUDGMENT OF THE SUPREME COURT OF GEORGIA.

The petition of Mrs. Mattie L. Smith to the Supreme Court of the United States for rehearing for allowance of writ of certiorari to review final judgment of the Supreme Court of Georgia respectfully shows as follows:

I

On March 31, 1947, this Honorable Court entered its order granting the motion of the appellees to dismiss, for

lack of jurisdiction, the appeal allowed by the Supreme Court of Georgia, but this Court, in the said order, treated the papers whereon the appeal was allowed as a petition for the writ of certiorari, as required by Sec. 237(c) of the Judicial Code, as amended, 28 U. S. C., Sec. 344(c), and thereupon denied certiorari.

Based upon the application of petitioner, Mr. Justice Black entered an order, dated April 25, 1947, extending the time to and including May 20, 1947, within which to file a petition for rehearing in the above-entitled cause. Accordingly, this petition is filed for such rehearing, petitioner hereby invoking the jurisdiction of this Honorable Court to grant the writ of certiorari under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 938, Title 28, U. S. C. A. Sec. 347(a).

II

This equity suit was tried before the Court and a jury in said Superior Court of Jefferson County, Georgia, and after all the evidence was introduced by the parties, the Court directed the jury to render a verdict in favor of the defendants (Transcript, pp. 144, 151), upon which judgment was entered (Transcript, p. 145), after the overruling of petitioner's motion for a new trial (Transcript, pp. 28, 31, 67, 146). An appeal was taken to the Supreme Court of Georgia, the highest Court of the State, which affirmed the judgment of the trial Court (Transcript, pp. 172-3). Motion of petitioner for a rehearing was denied (Transcript, pp. 174, 195).

Question Presented

The trial Court, giving a peremptory instruction to the jury to render their verdict in favor of the defendants, upon which judgment was entered, and the Supreme Court

of Georgia, in affirming the judgment, such rulings were erroneously based upon the ground that where a deed executed by a sheriff, pursuant to a sale under a tax execution, *even if void for any reason, is such color of title as will support prescription by seven years' adverse possession* (Transcript, pp. 164, 169, 170).

III

Ruling of the Supreme Court of Georgia Violates Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Briefly stated, petitioner respectfully insists (1) that the decision and judgment of the Supreme Court of Georgia in this case, which deprived petitioner of her real estate, are in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, such Federal right having been set up by petitioner from the beginning of her suit in the trial court (Transcript, p. 8), as well as in the Supreme Court of Georgia (Transcript, pp. 198, 250); and (2) that the said decision and judgment of the Supreme Court of Georgia, involving such Federal right of substance, are not in accord with applicable decisions of this Honorable Court, as set forth in the Brief of petitioner, hereto attached.

IV

Summary of the Case

On July 11, 1944, petitioner, a non-resident of Georgia, filed her suit in equity in the Superior Court of Jefferson County, Georgia, against Jefferson County, through its Board of Commissioners of Roads and Revenues, J. E. Barrow, Clarence Henderson, and School District No. 2 of said County, through its Board of Trustees, F. T. McElreath, W. D. Evans, S. W. Overstreet and J. W. Futral,

T. H. Rivers as Tax Collector of said County, and James Hubbard as Sheriff of said County, *to cancel two certain deeds,* and for other relief (Transcript, 1-14), one from D. C. Thomas, Sheriff of Jefferson County, Georgia, to said Jefferson County, dated July 9, 1928, and without explanation withheld from the record until August 18, 1942, when it was then recorded in the Clerk's Office of said County, in Book VV of Deeds at page 118 (Transcript, 97), purporting to convey petitioner's two unimproved adjoining lots, situated in the City of Wadley, Jefferson County, Georgia, comprising 1½ acres, of the value of $4,000 (Transcript, 75), for a recited consideration of $40.00 (Transcript, pp. 4, 93), and the other deed from said Jefferson County, by its County Commissioners, to School District No. 2 of said County, dated January 1, 1930, and also without explanation withheld from the record until July 12, 1939, when it was then recorded in Deed Book 3-C, page 560, for a recited consideration of $45.00, conveying the lots of land above referred to (Transcript p. 97).

V

The deed from D. C. Thomas, Sheriff, as aforesaid, to said Jefferson County, above referred to, was void on its face by reason of the following (Transcript, pp. 6-8):

(a) The levy of the tax *fi. fa.*, the basis of said deed, was excessive, in that said land was capable of being divided into lots and sold separately, or a lot could have been carved therefrom and sold for a sum in excess of the taxes amounting to $22.20.

(b) Said tax *fi. fa.* was issued not against the petitioner, the owner of the land, but against one M. B. Salter, who was not, and who never was the owner of said land.

(c) Petitioner was a non-resident of the State of Georgia, had no prior notice of said levy and sale; that not having

returned the land for taxation for the year 1927, under section 92-8103 of the Code of Georgia, Annotated, the land should have been advertised for sale for 90 days in the official gazette of said county, if rental or hiring would not produce the amount of such taxes; the sale thereof having been advertised in the News & Farmer, the official gazette of said county, *only once a week for four successive weeks* during the month of June, 1928; said advertisement offering the land for sale on the first Tuesday in July, 1928, as the property of *M. B. Smith* whereas said deed contains the recital that said land was sold on the 9th day of July, 1928 (an illegal sales day), the first Tuesday in July in 1928 having fallen on July 2 (Transcript, p. 151).

(d) The Notice required under secs. 92-6212 and 92-6213 of the Code of Georgia, Annotated, to be given by the tax collector of the amount of taxes due, was not given to petitioner nor to her representative, although her ownership of said land was well known.

(e) Said advertisement of sale did not set forth the amount of the tax assessed.

(f) The said land was advertised as the land of M. B. Smith, who had no interest therein, it being owned by the petitioner, Mattie L. Smith.

(g) The said land could have been rented and said taxes paid therefrom, as provided by section 92-8103 of the Code of Georgia, Annotated.

(h) Said execution failed to state said property was unreturned in violation of section 92-8103 of the Code of Georgia, Annotated.

(i) No notice of a tax assessment for 1927 or 1928 against said property was ever given petitioner as required by law.

(j) The taking of petitioner's land under said tax deed was without due process of law in violation of the due

process clause of the Fourteenth Amendment to the Constitution of the United States (Transcript, p. 8).

VI

On the first Wednesday in November, 1929, when petitioner's husband learned of the purported sale of her land to the said Jefferson County, he, accompanied by counsel, appeared before the Board of Commissioners of said county and offered to pay all taxes, interest, cost, or other lawful charges, against said land, and to redeem such land, which payment the commissioners refused to accept (Transcript, p. 79).

VII

The deed of conveyance to School District No. 2 of said county, above referred to, is void for the following reasons (Transcript, p. 10):

(a) Said county of Jefferson acquired no title to the land in question, and, therefore, had no title to pass.

(b) No resolution was adopted by the said Board of Commissioners, authorizing the execution of said conveyance; and

(c) No commissioner was appointed by said board to sell said land, as required by the law of Georgia prior to 1935 (173 Ga. 499) (Transcript 10).

VIII

On August 24, 1942, immediately after her discovery of said deeds, petitioner, through her attorney, erected a fence around said unimproved tract of land, whereupon S. W. Overstreet a county commissioner, had said attorney arrested therefor and had said fence torn down (Transcript, p. 72).

WHEREFORE, petitioner respectfully prays that upon a rehearing and reconsideration of the application of your petitioner for the allowance of the writ of certiorari that such writ issue out of and under the seal of this Honorable Court directed to the Supreme Court of Georgia, commanding said Court to certify and send to this Court a transcript of the record and of all proceedings in this case (same being entitled *Mrs. Mattie L. Smith* v. *Jefferson County et al.*, No. 15601 on the docket of said Supreme Court of Georgia) to the end that the record and proceedings therein be reviewed by this Honorable Court and the judgment of said Court be reversed, with directions to the Supreme Court of Georgia to remand said cause to the Superior Court of Jefferson County, Georgia, to set aside the judgment therein entered in the aforesaid case, and grant your petitioner a new trial, or for such further proceedings not inconsistent with the opinion and judgment of this Honorable Court, and for such other and further relief in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

MRS. MATTIE L. SMITH,
By LEVI H. DAVID,
Bond Building,
Washington, D. C.,
Petitioner's Attorney.

May 20, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1096

MRS. MATTIE L. SMITH,

Appellant,

vs.

JEFFERSON COUNTY, GEORGIA, ETC., ET AL.,

Appellees

ON REHEARING FOR ALLOWANCE OF WRIT OF CERTIORARI TO REVIEW FINAL JUDGMENT OF THE SUPREME COURT OF GEORGIA

BRIEF IN SUPPORT OF PETITION

I

Opinion of Court Below

The opinion of the Supreme Court of Georgia is contained in the record herein, and also in the printed "Statement as to Jurisdiction" at pages 5 to 12, inclusive.

II

Jurisdiction

The petitioner respectfully invites the attention of the Court to the petition, to which this Brief is attached, as to

the jurisdiction of this Honorable Court to grant the writ of certiorari to the Supreme Court of Georgia.

III

Specification of Errors

The Supreme Court of Georgia erred in the following particulars:

1. In holding that even should it be assumed that the deed of the Sheriff of Jefferson County, Georgia, to said Jefferson County, conveying petitioner's land, was based upon a void *fi. fa.* and that such *fi. fa.* amounted to no execution at all, such deed was good as color of title.

2. In not holding that the void deed of the Sheriff of Jefferson County, Georgia, to said Jefferson County, based upon a void *fi. fa.*, constituted no color of title and did not start the running of the statute of limitations, and in not holding that the taking of petitioner's land under the void deed resulted in the violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. In not holding, in accordance with decisions of the Supreme Court of the United States (hereinafter cited) that possession under the void deed of the Sheriff of Jefferson County, Georgia, to said Jefferson County, based upon the void execution for taxes against petitioner's land, constituted no color of title sufficient to start the running of the statute of limitations.

4. In not holding that neither the deed of the Sheriff of Jefferson County, Georgia, to said Jefferson County, nor the deed of said Jefferson County to School District No. 2, passed any title to petitioner's land sufficient in law to constitute color of title to start the running of the statute of limitations.

5. In deciding that each of the said deeds based upon a void execution for taxes against petitioner's land, justified in law color of title sufficient to start the running of the statute of limitations from the date of the Sheriff's void deed, such decision being in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

Argument

By the specification of errors the petitioner contends that the ruling of the Supreme Court of Georgia in holding that although the tax deed from the Sheriff of Jefferson County, Georgia, to said County, and the deed from said County to School District No. 2 of said County, were void, nevertheless, each of said void deeds created "color of title" sufficient in law to start the running of the short seven- years' statute of adverse possession, was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

It is submitted that under decisions of this Court the possession by one under a void deed does not create color of title which is protected by the statue of limitations.

Parker v. *Rule's Lessee,* 9 Cranch, 64 (1815)
Walker v. *Turner,* 9 Wheaton, 541, 552 (1824)
Moore v. *Brown,* 11 Howard, 414, 425 (1850)
Redfield v. *Parks,* 132 U. S. 239, 250, 251 (1889)

In *Redfield* v. *Parks, supra,* the Court says (p. 250):

> "We think it very clear that the judge was correct in holding this tax deed to be void. It was not merely void by extrinsic facts shown to defeat it, but was absolutely void on its face. But we think that the court erred in holding that such an instrument could create color of title which would bring the case within the foregoing statute of limitations.

"The case of Moore v. Brown, 11 How. 414, brought the question before this court. The court says, p. 425:

> " 'It is disclosed upon the face of the deed that the auditor sold the land short of the time prescribed by the act. It was not, then, a sale according to law. That must have been as well known by the purchaser as it was by the auditor.' "

"After a somewhat elaborate opinion it was certified to the Circuit Court, from which the case had come by division of opinion, 'that the paper offered in evidence by the defendant is a void deed upon the face of it, and was not admissible as evidence for the purpose for which it was offered,'—which was to support the possession under the statute of limitations."

The Court cites a number of State decisions similarly holding that possession under a void deed creates no color of title to sustain adverse possession.

In the instant case, petitioner emphasizes the fact that the writ of execution commanded the Sheriffs, Deputy Sheriffs or Constables of Jefferson County, Georgia, out of the goods and chattels, if any be found, otherwise of the lands and tenements of M. B. SALTER (not the owner of the land, Mrs. Mattie L. Smith) by levy and sale thereof to enforce the collection of the taxes, in the sum of $22.20, with interest. And the two lots of the petitioner, a non-resident of Georgia, without notice, valued at $4,000 were sold by the Sheriff to the County of Jefferson for $40.00. No return was made as to personal property of the petitioner.

In *Stead's Executors* v. *Course*, 4 Cranch, 403, Chief Justice Marshall rendered the opinion of the Court. At page 414, the Court says:

> "In examining the law under which this sale was made, the court perceives that the collector is authorized to sell land only on the deficiency of personal estate; and then to sell only so much as is necessary,

to pay the tax in arrear. In this case a sale is made of a whole tract of land, without specifying the amount of taxes actually due for which that land was liable and could be sold. This is proceeding in a manner not strictly regular. The sale ought to have been of so much of the land as would satisfy the tax in arrear. Should it be true that the land was actually liable for the whole sum for which it sold, it would still be incumbent on the vendee to prove that fact; for it cannot be presumed. Every presumption, arising from the testimony in the cause, is against it.

"Had this fact been established, the court is inclined to think that the circumstances of the case as stated, though not perhaps amounting to proof of fraud, afford such presumptions as would render a final decree, without further testimony, unsatisfactory, and that an issue ought to have been directed, on the question whether the sale was fraudulent or not. But if a whole tract of land was sold when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector unquestionably exceeded his authority, and the plea cannot be sustained."

In the above case, the judgment of the circuit court of the United States for the District of Georgia was reversed. Compare *Wetmore* v. *Karrick*, 205 U. S. 141.

Where a statute required the delinquent list to contain a statement of the amount of taxes due on each parcel of land, an omission or error in such statement is generally held to be a fatal defect. *Goodrich* v. *Darr*, 161 Ark. 514; *California L. & T. Co.* v. *Weis*, 118 Cal. 489; *Mann* v. *People*, 102 Ill. 346. Illustrative of the strictness of the rule requiring conformity to the statute authorizing sale of the owner's real estate for delinquent taxes, it was held in *Warden* v. *Broome*, 9 Cal. App. 172, where the statement of the amount of taxes, penalties and costs set forth the amount as $19.90, whereas the correct amount was $19.40, the court held the tax sale void.

In *Kann* v. *King*, 25 U. S. Court of Appeals, D. C., 182, 183, the court held that the statutes regulating the matter of sales of real estate for non-payment of taxes must be strictly pursued, in order to devest title from the owner. (This case was reversed on other grounds, 204 U. S. 43).

In *Davis* v. *Seybold*, 195 Fed. 409, the court held that where invalidity appeared on the face of the deed, possession under the deed cannot be made the foundation of color of title to enable the grantee to claim the benefit of an adverse holding.

In *Arrowsmith* v. *Burlingim*, 1 American Law J. (N. S.) 448, 1 Fed. Cases 1187, the court held that possession without color of title amounts to nothing and that to render an Auditor's deed as evidence of title to land sold for taxes under the law, it must be first shown that the requirements of the law have been complied with, and that the statute of Illinois to quiet possession and confirm titles to land is not a limitation law, but the court held that it is a legislative conveyance and an adjudication of one man's land to another, therefore such an act is unconstitutional.

In *Cook* v. *Lasher*, 73 Fed. [illegible], the court held that a delay of a land owner in bringing a suit to annul a tax deed, which is void for failure to comply with the requirements of the statute, and which consequently does not affect his title, is not imputable to him as laches.

Wherefore, it is respectfully submitted that the writ of certiorari should be granted.

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